IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 210

JAMES T. STEVENS, *Petitioner,*

v.

CHARLES A. MARKS, Justice of the Supreme Court of New York, County of New York, *Respondent.*

On Writ of Certiorari to the Appellate Division of the Supreme Court, First Judicial Department in the County of New York

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No. 290

JAMES T. STEVENS, *Petitioner,*

v.

JOHN J. MCCLOSKEY, Sheriff of New York City, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, AS AMICUS CURIAE, URGING REVERSAL

This brief amicus curiae, urging reversal of the judgments below, is filed on behalf of the Patrolmen's Benevolent Association of the City of New York with the consent of the parties.[1]

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[1] The written consents of counsel for the petitioner and counsel for the respondents have been lodged with the Clerk pursuant to Rule 42(2).

The Patrolmen's Benevolent Association of the City of New York is an organization representing and composed of more than 22,000 members of the Police Department of New York City. It has a vital concern with the issues and principles at stake before the Court in these cases, particularly since approximately 150 of its members have been forced to sign waivers of immunity and have testified in the grand jury proceedings that gave rise to the instant cases.

The Patrolmen's Benevolent Association subscribes fully to the constitutional and legal arguments set forth in the brief of the petitioner James T. Stevens. In so doing, the Association wishes to underscore and emphasize the coercive nature of the choice put upon police officers by the provisions of Section 1123 of the New York City Charter and Article 1, Section 6, of the New York State Constitution. It is that choice, the choice between waiving a federal constitutional privilege or losing one's employment rights, that renders unconstitutional the provisions in question.

Any contention that this choice lies within the bounds of the individual's free will is unrealistic. When a police officer is confronted by an Assistant District Attorney with the statement that a refusal to sign a limited waiver of immunity will bring into operation the employment forfeiture provisions of the City Charter and State Constitution, the police officer has no free choice in the matter. Fearful of losing his job, fearful of losing forever his employment opportunities with the City, he will, more often than not, feel compelled to sign the waiver and forfeit his constitutional privilege against self-incrimination. Such has been the experience and the motivation of all the many police officers who have signed the waivers.

There is thus no real freedom in "choosing" to sign the waiver. That freedom, which is the hallmark of any meaningful waiver of a constitutional right, has been replaced by the coercive and frightening threat of the permanent and summary loss of employment. To lose one's employment in these circumstances involves not only the immediate destruction of economic security but the inevitable stigma of a dischargee. Other employment opportunities will unquestionably be severely limited as to one who has a summary discharge on his record; certainly no government or civil service job would ever be offered such a person. And the dischargee stands to lose all his pension rights, which vest after 20 years of service and which amount to one-half pay for the rest of his life plus a widow's pension. The loss of these rights cannot be considered inconsequential.

Such economic disabilities must be regarded as punishment. *Cummings* v. *Missouri*, 4 Wall. 277, 323; *United States* v. *Lovett*, 328 U.S. 303, 316.[2] And to inject this threat of punishment into the atmosphere surrounding the determination of whether to assert or waive one's constitutional privilege against self-incrimination effectively destroys the unfettered free will which should mark that choice. See *Malloy* v. *Hogan*, 378 U.S. 1, 8. Therein lies the constitutional infirmity of Section 1123 of the City Charter and Article 1, Section 6, of the State Constitution.

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[2] The punishment inherent in the provisions of Section 1123 of the City Charter and Article 1, Section 6, of the State Constitution contains many of the elements of a bill of attainder as described in the *Cummings* and *Lovett* cases. But their direct impact upon the freedom of choice in asserting or waiving the federal privilege against self-incrimination makes it unnecessary to explore these provisions in terms of bills of attainders.

It is no answer to say that the State may condition the privilege of public employment upon such conditions and terms as it sees fit to impose. Certainly a State may not punish summarily any employee who asserts a federal constitutional right. *Slochower* v. *Board of Education*, 350 U.S. 551. No less may it do so indirectly by threatening punishment under the guise of enforcing a condition of public employment. As this Court said in *Frost* v. *Railroad Commission*, 271 U.S. 583, 593, "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege [such as public employment] which the state threatens otherwise to withhold." See also *Hanover Fire Ins. Co.* v. *Carr*, 272 U.S. 494, 507; *Alston* v. *School Board of City of Norfolk*, 112 F. 2d 992, 997 (C.A. 4); *Peck* v. *Cargill*, 167 N.Y. 391, 60 N.E. 775.

Petitioner is quite correct in noting (Brief, pp. 38-39) that these cases in no way involve the right of the City or the State to discipline or discharge policemen for failing to cooperate in an investigation into the conduct of their official duties.[3] The sole question

[3] Such cases as *Christal* v. *Police Commission of San Francisco*, 33 Cal. App. 2d 564, 92 P. 2d 416, 419; *Souder* v. *City of Philadelphia*, 305 Pa. 1, 156 A. 245; *Scholl* v. *Bell*, 125 Ky. 750, 102 S.W. 248; and *Drury* v. *Hurley*, 339 Ill. App. 33, 88 N.E. 2d 728, are not in point. Those cases involved disciplinary proceedings, including due notice and an opportunity to be heard, as to policemen who had remained silent when questioned about their official functions. They did not involve consideration of any coercive threat directed to the initial choice to speak or to remain silent.

here is whether the City and State may constitutionally destroy the unfettered freedom which was designed to accompany the choice of speaking or remaining silent when confronted with incriminating questions. On that score, the combined voices of the members of the Patrolmen's Benevolent Association of the City of New York can testify to the fact that such freedom has in fact been corrupted by the provisions in question. And they urge that such provisions be stricken down as being an unconscionable burden upon the free assertion of the privilege against self-incrimination as protected by the Fifth and Fourteenth Amendments.

Respectfully submitted,

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